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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

BRIEF FOR THE PETITIONER.

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Opinions Below.

This Court granted certiorari to review the opinion of the Court of Appeals for the Ninth Circuit which is officially reported at 535 F.2d 533 (9th Cir. 1976), and which appears in the Appendix at pages 25-43. The opinion of the District Court for the Central District of California was not officially reported but is unofficially reported at 12 FEP 1298 and appears in the Appendix at pages 19-24.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 11, 1976, and the Petition for Certiorari was filed on July 23, 1976, less than 90 days thereafter. The petition was granted on December 13, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provision Involved.

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5(f)(1) (hereinafter "Title VII"), is the statutory provision which confers on the Equal Employment Opportunity Commission (hereinafter the "EEOC") the authority to file suit in the federal district courts. Section 706(f)(1) is lengthy and is thus set forth in its entirety in the Appendix at pages 43-44; the most pertinent language thereof is set forth at pages 18-19 of this Brief.

Questions Presented for Review.

1. Whether Congress intended that there be no time limitation whatsoever applicable to the EEOC's right to sue under Title VII?

2. Whether Congress intended the 180-day provision in Section 706(f)(1) to serve as a federal limitation period on the EEOC's right to sue?

3. Assuming *arguendo* that there is no federal limitation period, whether the most analogous state limitation period is applicable to the EEOC's right to sue?

Statement of the Case.

On December 27, 1970, Tamar Edelson filed a charge of discrimination against Petitioner with the EEOC alleging that she had been discriminated against because of her sex. Her charge specified that "the most recent date on which this discrimination took place" was "October 1, 1970," the date of her discharge by Petitioner (A. 2).

Although the EEOC acknowledged receipt of Ms. Edelson's charge on December 30, 1970, the EEOC

did not formally file her charge until March 9, 1971. The EEOC acknowledges that this charge is the only charge upon which its complaint herein is based.

However, it was not until February 22, 1974—three years, four months and 22 days after the occurrence of the act of discrimination of which Ms. Edelson had complained—that the EEOC finally filed this complaint seeking back pay for Ms. Edelson and innumerable other private individuals as well as injunctive relief (A. 9-13). The District Court dismissed the EEOC's complaint upon the grounds that (1) Section 706 of Title VII imposed a 180-day federal limitation period on the EEOC's right to sue, and (2) alternatively, assuming that no federal limitation period exists, the EEOC's suit was barred by the most analogous state limitation period (A. 20-24).

On May 11, 1976, the Court of Appeals for the Ninth Circuit reversed on both grounds, holding that there was *no time limitation whatsoever* on the EEOC's right to sue. First, the Ninth Circuit found that the 180-day language of Title VII does not constitute a federal limitation period, so that "there is simply no governing federal limitations period" (A. 27-29). Second, expressly departing from two recent decisions of the Court of Appeals for the Fifth Circuit, the Ninth Circuit refused to apply the most analogous state limitation period (A. 29-37). This Court granted the Petition for Certiorari to review both holdings of the Ninth Circuit.[1]

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[1]The Ninth Circuit had also held, in part IV of its Opinion (A. 38-42), that the EEOC's right to sue was not limited to matters raised by the underlying charge. However, review was not sought on that holding and thus that aspect of the Ninth Circuit's opinion is not before this Court.

Summary of Argument.

This Court has three options with regard to the duration of the EEOC's right to sue under Title VII: (i) the right is interminable, (ii) the right is governed by a federal limitation period, or (iii) the right is governed by the most analogous state limitation period.

A. There is absolutely no suggestion in the 1972 debates that Congress, in conferring the right to sue on the EEOC, intended that right to be interminable. Quite to the contrary, Congress granted the right to sue to the EEOC for the express purpose of eliminating the 18-24 month delays of the EEOC in resolving charges of discrimination. Pervading the 1972 debates was a universal Congressional determination that such EEOC delays were intolerable and would be eliminated once the EEOC had the right to sue. The absence of any limitation period would, contrary to the Congressional purpose, subject charging parties to interminable delay and respondents to interminable liability. The only serious issue, therefore, is whether Congress intended a federal limitation period or was content to leave the matter to the most analogous state limitation period.

B. The 180-day provision in the 1972 Amendments authorizing the EEOC to file suit was intended and understood by Congress to be a federal limitation period on that right. Senators Dominick and Javits, the principal spokesmen in the final days of the 1972 debates, both explained that the EEOC's right to sue ended on the 180th day after the charge was filed. Furthermore, the entire enforcement scheme enacted in 1972 requires such expeditious action by the EEOC if the time limitations imposed on the charging party and

on the federal district court are to have any meaning at all. The EEOC's current practice of totally ignoring the 180-day provision frustrates the clear purpose of the Act—to protect the interests both of charging parties and respondents by resolving charges of discrimination expeditiously.

C. Assuming *arguendo* that the 180-day provision does not constitute a federal limitation period, judicial authority and the legislative history require the application of the most analogous state limitation period. This Court and the lower federal courts have consistently applied the most analogous state limitation period in the absence of a federal limitation period, with only one exception. That exception has been limited by this Court to suits brought by the United States as a sovereign to protect its rights as a sovereign, *i.e.*, to collect money for the United States Treasury or to prevent an injury to the United States Government itself. Any enlargement of that existing exception would frustrate rather than further the purposes of Title VII.

ARGUMENT.

A. The Legislative History of the 1972 Amendments to Title VII Reveals a Congressional Intolerance With Existing EEOC Delays Which Necessarily Precludes Any Congressional Intention to Give the EEOC an Interminable Right to Sue.

Congress, in originally enacting Title VII in 1964, withheld from the EEOC any right to sue. Instead, the EEOC was limited to investigation and conciliation, followed if necessary by private or Justice Department litigation. As a result, by April 1971, the EEOC was taking an average of 18 to 24 months to dispose of charges brought before it.[2]

Thus, by the fall of 1971, Congress had become appalled by the slow pace of the existing enforcement procedure under Title VII, and the effort began in Congress to devise a faster and more effective method of enforcement. Indeed, as the debates concerning the 1972 Amendments continued, it became apparent that the key issue was not *whether* Title VII enforcement should be more expeditious, but *how* it could be made more expeditious than the existing 18-24 month EEOC average.[3]

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[2]That was the testimony of EEOC Chairman Brown in April 1971, which 18-24 average became the accepted figure during the 1972 debates concerning the current EEOC case-handling delays. SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 121 (Comm. Print 1972) [hereinafter cited as 1972 LEG. HIST. Excerpts from the legislative history are contained in a separate volume lodged with the Court for its convenience in reviewing the portions of the legislative history cited in this Brief.].

[3]Congressman Quie, the ranking minority member of the House Committee on Education and Labor, noted in debate on September 15, 1971, that virtually all members of the Committee agreed on the need for giving enforcement powers to the EEOC:

> "[D]isagreement arose *only* as to which method of enforcement would be not only most effective but, expeditious, fair and equitable as well." [Emphasis added].

1972 LEG. HIST. 200.

One group of Congressmen, led principally by Senator Javits and Senator Williams, proposed to expedite the process by giving the EEOC "cease and desist" authority like that possessed by the National Labor Relations Board and many other federal agencies.[4] Other Congressmen, however, led principally by Senator Dominick and Congressman Erlenborn, opposed such adjudicative authority for the EEOC, convinced instead that authorizing the EEOC to file its complaint in the federal district courts would provide more expeditious and effective enforcement of Title VII than authorizing the EEOC to adjudicate cases on its own.[5]

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[4]Senator Williams and Senator Javits were co-sponsors of Senate Bill 2515, which originally provided for cease and desist enforcement powers. 1972 LEG. HIST. 34[illegible], 382-83. Senator Williams was chairman of the Senate Committee on Labor and Public Welfare, which favorably reported S. 2515 to the floor of the Senate, and he was the floor manager for the bill. 1972 LEG. HIST. (II), 410, 652. During the debates on S. 2515, Senator Javits and Senator Williams spoke frequently and vigorously in favor of the cease and desist approach.

[5]Senator Dominick consistently was the leading advocate in the Senate of court enforcement. As a member of the Senate Committee on Labor and Public Welfare, he dissented from the majority report on S. 2515 and urged court enforcement rather than the cease and desist mechanism provided by the bill reported to the floor. 1972 LEG. HIST. 493, 495. Dominick's Amendment No. 884 to S. 2515 provided for court enforcement. 1972 LEG. HIST. 1499-1504. Amendment No. 884 was substituted for a Javits-Williams "compromise" amendment to S. 2515 in the late stages of the debate. 1972 LEG. HIST. 1556-57. Thus, S. 2515 as finally passed by the Senate included the Dominick court enforcement procedure. 1972 LEG. HIST. 1560-61, 1778-79. Congressman Erlenborn was a member of the House Committee on Education and Labor, which favorably reported a cease and desist proposal (H.R. 1746).

(This footnote is continued on next page)

In the amendment which eventually passed, Congress determined that EEOC "court enforcement" was the most expeditious manner of Title VII enforcement. Thus, Section 706(f)(1) was amended in 1972 to authorize the EEOC to file suit in federal district court on the basis of a specific underlying charge whenever the EEOC was unable to secure an acceptable conciliation agreement within 30 days after the charge had been filed.

1. Fairness to Charging Parties.

The discussions leading up to that final resolution are very revealing as to what Congress expected by way of expeditious EEOC action in the future. First, it must be remembered that the entire dispute arose because of the universal dissatisfaction with the EEOC's existing 18-24 month delay in charge resolution. All agreed that a faster resolution was necessary—the dispute was how—and all obviously believed that the changes enacted in 1972 would *eliminate, not perpetuate* the EEOC 18-24 month delays.

Second, the court enforcement bill which was eventually enacted in Section 706(f)(1) was introduced by Senator Dominick, who served as the principal Congressional spokesman as to its meaning and merits. During the floor debate on January 20, 1972, Senator Dominick defended his proposal on the ground that

> "I do not care who it may be, or how long they may have been claiming discrimination, *if they*

Representative Erlenborn joined in a minority committee report that favored court enforcement. 1972 LEG. HIST. 118-27. Along with Congressman Mazzoli, Congressman Erlenborn sponsored the "Erlenborn-Mazzoli" substitute for H.R. 1746, which provided for court enforcement and was eventually adopted by the House. 1972 LEG. HIST. 141-47, 311-14, 321-23.

> *have to wait 20 months* before they even find out whether or not the Commission feels that the charge is valid, all one can say is that justice delayed is *justice denied*." [Emphasis added].[6]

Later in the same day's debate, Senator Dominick explained:

> "[W]ith the independent General Counsel that has just been created for the EEOC itself, we would now have the legal machinery to *move rapidly* on the enforcement of whatever legitimate complaints may come before the EEOC which cannot be solved by conciliation.
>
> * * *
>
> "As I said earlier, it seems wrong to me to say to an aggrieved employee, 'Certainly we will hear your case. We will do the investigating. We will bring the charges. We will do everything else, but you will not get a decision for *over 2 years.' That is not justice.* That is not equal employment opportunity. But if we have the investigator saying that this is a legitimate complaint, and that it will be brought to the district court and will get priority treatment there, we can get the matter decided in *half the time* it would take in any other way." [Emphasis added].[7]

On January 24, 1972, Senator Dominick pointed out another substantial advantage of court enforcement:

> "The *imminence of court action,* coupled with the threat of adverse publicity and immediately

[6] 1972 LEG. HIST. 677.

[7] 1972 LEG. HIST. 681.

enforceable orders will serve as a powerful inducement to voluntary settlement." [Emphasis added].[8]

Later that same day, Senator Dominick again expressed his intolerance for two-and three-year delays:

> "If the Senate is truly interested in an effective, expeditious grievance resolution procedure we should place our trust in our Federal court system. Although cease and desist promises much, a shiny new administrative procedure designed to redress grievances is no better than its performance, and *if it requires 2 to 3 years to achieve justice, its potential is nothing but a frustrating promise of what might have been.*" [Emphasis added].[9]

In his final summation on February 15, 1972, in support of his court enforcement amendment which passed the Senate a few minutes later, Senator Dominick stated:

> "[I]t could take 2½ years from the time a worker walks into a regional NLRB office with a charge until the time a court of appeals finally issues an order that he be reinstated with or without back pay. . . .
>
> "I do not think that this [two and a half year delay from charge to final court order] would be true under job discrimination with the adoption of my amendment. . . ."[10]

Contrast these statements made by the author of the EEOC's Section 706(f)(1) right to sue with the fact that the EEOC took over 36 months in the case at bar just to bring its complaint to the District Court!

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[8]1972 LEG. HIST. 794.
[9]1972 LEG. HIST. 795.
[10]1972 LEG. HIST. 1553.

Furthermore, Senator Dominick's intolerance for the existing 18-24 month EEOC delays was fully shared by those who supported the cease and desist alternative. Indeed, the principal argument made by the cease and desist proponents against court enforcement was based on the statistic that the median time for federal court resolution of cases was 19 months—a time span the cease and desist proponents found unacceptable.[11] Senator Williams summarized this point well in his remarks during the floor debate on January 24, 1972:

> "When we look at the caseload of the district courts, . . . I am not proud of the fact that from the inception of a case in the State of New Jersey to its conclusion, the time has now reached 29 months. I am not proud of that. Justice delayed, it has been said by wiser authorities than this Senator, is justice denied. Twenty-nine months is a long, long time in the district courts of the State of New Jersey.
>
> I will state that in the State of North Carolina, in the eastern district, *20 months* is the time from the filing of an action to a decision in the case, and *that is too long.*" [Emphasis added].[12]

Such comments from the critics of EEOC court enforcement demonstrate two points. First, no one expressed *any* concern that the EEOC would have diffi-

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[11]*See, e.g.,* remarks by Congresswoman Abzug (1972 LEG. HIST. 275) and Congressman Robison (1972 LEG. HIST. 303). Indeed, Congressman Reid referred to one court case he was aware of where the court delay was 13 months:

> "Even more *outrageous* is the fact that charges were originally brought in this case *3 years ago.*" [Emphasis added].

1972 LEG. HIST. 283.

[12]1972 LEG. HIST. 832-33.

culty getting to court with its complaint promptly. Rather, the whole focus was on how long the courts might take once the EEOC's complaint was filed, and these persons even suggested that the EEOC could complete the *entire* adjudicative process in less than six months.[13] Second, these statements decrying the 19-month median delay in federal courts for resolution of complaints simply demonstrate the conviction that 19 months was an unacceptable period of time to wait for resolution of charges.

Thus, in light of the overwhelming Congressional indignation at the EEOC's 18-24 month delays and the obvious belief on the part of all members of Congress that they were enacting a system to prevent the continuation of that unacceptable situation, how can it seriously be argued that Congress nevertheless intended that the EEOC would have forever to commence suit? Quite obviously, had anyone had the temerity even to suggest such a notion in the halls of Congress, he or she would have been immediately and universally repudiated!

2. Fairness to Respondents.

Furthermore, the 1972 debates reveal substantial concern about the fundamental unfairness to respondents resulting from excessive delays like the 18-24 month delays to which respondents were then being subjected by the EEOC:

> Congressman Mazzoli (Individual Views in Report of House Committee on Education and Labor, June 2, 1971): "Basically, I prefer

[13]S. REP. NO. 92-415, 92d Cong., 1st Sess. 1, 24 (1972), 1972 LEG. HIST. 410, 433.

> the stability, *expedition* and protection to plaintiff and *defendant* alike offered by judicial enforcement. . . ." [Emphasis added].[14]

> Congressman Erlenborn (September 16, 1971): "Mr. Chairman, I urge support of the Erlenborn-Mazzoli substitute, which would give the Commission the right to go into court, resulting in fairness to *both parties*, and *expeditious*, judicial and fair relief." [Emphasis added].[15]

> Senator Dominick (Individual Views in Report of Senate Committee on Lab and Public Welfare, October 28, 1971): "Effective protection of the rights of both the *employer* and the employee demands a *speedy resolution* of the dispute." [Emphasis added].[16]

> Senator Dominick (November 8, 1971): "Mr. President, what this amendment would do is to *guarantee* the protection of *both parties'* rights through fair, effective, and *expeditious* Federal court machinery." [Emphasis added].[17]

> Senator Dominick (January 21, 1972): "This amendment protects the rights of both *respondents* and aggrieved by providing a fair, effective, and *expeditious resolution* of the dispute." [Emphasis added].[18]

[14]1972 LEG. HIST. 129.
[15]1972 LEG. HIST. 284.
[16]1972 LEG. HIST. 495.
[17]1972 LEG. HIST. 549.
[18]1972 LEG. HIST. 695.

Senator Dominick (January 21, 1972): "As I po[i]nted out, effective protection of the rights of both the *employer* and the employee demands a *speedy resolution* of the dispute."[19] [Emphasis added].

Senator Fannin (January 21, 1972): "In addition, court enforcement offers a *more expeditious* settlement, and a *speedy resolution* is vitally important to both an aggrieved employee and to a *respondent employer.*"[20] [Emphasis added].

Senator Brock (January 21, 1972): "I do not feel that it is fair for the Government agencies to keep either *respondents* or complainants waiting years before matters in which they are vitally interested are disposed"[21] [Emphasis added].

Senator Hruska (February 9, 1972): "The *present situation* is quite a hodge-podge. . . . It is *a disservice to the employer not only on the question of expeditiousness,* but also because of the burdens forced on a respondent who is called upon to defend the same case in numerous forums. And it is a *disservice to the public* which should be entitled to quick, clear, and certain resolutions of these questions."[22] [Emphasis added].

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[19]1972 LEG. HIST. 696.
[20]1972 LEG. HIST. 699.
[21]1972 LEG. HIST. 782.
[22]1972 LEG. HIST. 1396.

Senator Hollings (February 16, 1972): "By prevailing for a judicial procedure, we have assured to the *employer* that he will not be unconscionably harassed."[23] [Emphasis added].

The court enforcement procedure enacted was thus designed to provide protection against delay for respondents as well as aggrieved parties. Yet an absence of any limitation on when the EEOC can file suit would guarantee the denial of those rights!

Indeed, such an absence would be abhorrent not only to the legislative intent in 1972 but to the very concept of due process as well, for as Chief Justice John Marshall observed 172 years ago, an absence of some statute of limitations

> "would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture."

Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805).

Additionally, this due process concern for the rights of respondents is a very real one, for at this very time the EEOC has over 120,000 charges before it, many of which are several years old.[24] Witnesses have

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[23]1972 LEG. HIST. 1595.

[24]Augustus Hawkins (D-Calif.), Chairman of the House Labor Subcommittee on Equal Opportunities, noted at the oversight hearings in May 1976 that the Commission has a backlog of 120,000 cases and that some charges have been pending for as long as seven years. 92 BNA LAB. REL. REP. 66 (May 24, 1976).

become unavailable, evidence has been forgotten or lost, and memories have dimmed. Potential financial liabilities are staggering, yet they are often ones which are unclear and against which a respondent cannot protect itself because their nature, extent and duration remain undefined for months and years.

Each one of these stale claims is a time bomb, waiting to be exploded by the EEOC at a time of its choosing—unless of course some limitation period exists. This is true for very real and practical reasons based upon the EEOC's practices and procedures which serve only to exacerbate the travesty created by the EEOC's interminable delay.

First, the EEOC employs various devices so that many charges are *never* closed. For example, the EEOC's Compliance Manual provides that if the charging party wishes to withdraw his or her charge, the EEOC will *not* honor that request but will only administratively close the file.[25] The charge remains officially on record and at any time months or years thereafter, the EEOC can resurrect that charge and file a court action, for as the EEOC ominously advises the respondent at the time of administrative closure, "you will be informed immediately if the charge is reopened for any reason."[26] Similarly, the same Manual prescribes that if the EEOC cannot find the charging party, the charge will be administratively closed[27]—again putting the charge in a position to be resurrected at any time of the EEOC's choosing.

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[25]EEOC Compliance Manual §7.1.

[26]EEOC Compliance Manual Exh. 7-D.

[27]EEOC Compliance Manual §6.5(b).

Second, in addition to the fact that the EEOC, when it does bring suit, normally expands the complaint to include all individuals in the charging party's "class", the situation is aggravated all the more by the fact that the EEOC—with appellate court approval[28]—further expands the complaint to include *any* matter discovered during the investigation of the charge, whether or not the additional matter is of any concern to the charging party or could even have been raised by the charging party.

Thus, if the EEOC's contention that there is no limitation on its right to sue were to be sustained, the EEOC could, for example, take a charge of religious discrimination filed by a male in 1970 and bring suit in 1980 alleging sex discrimination by the same respondent against its 10,000 female employees, back pay liability for which could date back 12 years to 1968.[29] Indeed, that such a result is in fact a real possibility is well illustrated by the case of *EEOC v. Knott's Berry Farm* presently pending in the Central District of California, where the EEOC's complaint, filed in August 1975, alleges extensive "across the board" class

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[28]*EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976) (race charge expanded to sex discrimination complaint); *EEOC v. Raymond Metal Products Co.*, 530 F.2d 590 (4th Cir. 1976) (national origin charge expanded to race and sex complaint); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 271 (4th Cir. 1976) (sex charge filed by a man expanded to complaint alleging sex discrimination against women); *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir. 1975).

[29]Section 706(g) provides a limitation on back pay liability to two years prior to the filing of the charge. Yet that limited protection for respondents is obviously rendered a nullity if the EEOC can wait three or five or ten years to file suit and is permitted to assert matters in its complaint which were never complained about in the underlying charge.

discrimination against Blacks, Asians, Spanish surnamed Americans, and Jews for the preceding 10½ years based on two individual charges filed in June 1971.[30]

This is not what Congress intended in the 1972 Amendments. Rather, the conclusion is inescapable that Congress intended *some* limitation on the time in which the EEOC could file suit, both to guarantee charging parties prompt and effective action on their charges and to guarantee respondents the fundamental fairness which lengthy delays clearly deny. The only serious issue, therefore, is whether Congress intended a federal limitation period or was content to leave the matter to the most analogous state limitation period.

B. Congress Intended the 180-Day Provision in Title VII to Serve as the Federal Limitation Period on the EEOC's Right to Sue.

The authority to sue which Congress gave the EEOC in 1972 is set forth in Section 706(f)(1) of the Act (A. 43-44):

> "[1] If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against . . . [the] respondent . . . [2] *if within one hundred and eighty days from the filing of such charge* . . . the Commission has not filed a civil

[30]No. CV-75-2739-AAH (C.D. Cal., filed August 15, 1975).

As another concrete example of extraordinary EEOC delay aggravated by great expansion of the eventual complaint, the Ninth Circuit in the instant case approved the EEOC's expansion of a charge filed by a pregnant female employee to include alleged causes of action relative to retirement benefits for male employees.

> action under this section . . . , *the Commission . . . shall so notify the person aggrieved* and [3] within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . . [4] Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance."[31] [Emphasis added].

Petitioner submits, for the reasons set forth below, that the 180-day provision italicized above was intended by Congress to serve as a time limitation on the EEOC's right to file suit.

While the appellate courts to date which have confronted this issue have each concluded that the foregoing 180-day provision was not intended as a time limitation on the EEOC's right to sue[32],

> "[I]t is the persuasiveness of judicial reasoning and not the force of numbers which is of prime importance in our system."[33]

[31]The numbers in brackets are inserted to assist analysis; they do not appear in the statute itself.

[32]*EEOC v. Duval Corp.*, 528 F.2d 945, 947 (10th Cir. 1976); *EEOC v. E. I. du Pont de Nemours & Co.*, 516 F.2d 1297, 1301-02 (3d Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1356-57 (6th Cir.), *cert. denied*, 96 S. Ct. 420 (1975); *EEOC v. Meyer Bros. Drug Co.*, 521 F.2d 1364 (8th Cir. 1975); *EEOC v. Cleveland Mills Co.*, 502 F.2d 153, 159 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975).

[33]*EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610, 618 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975) (Judge Moore's dissent from majority's holding that 180-day

(This footnote is continued on next page)

Petitioner respectfully submits that *none* of these appellate court decisions reflects an understanding of the significant legislative history concerning this issue.

Petitioner has set forth *supra* pages 6-18 the 1972 genesis of the EEOC right to sue and the overwhelming Congressional concern with expeditious EEOC enforcement of Title VII. With specific regard to the 180-day provision, the legislative history and the statutory scheme itself both demonstrate that that provision embodies the time limitation Congress intended on the EEOC's right to sue.

1. Legislative History.

Senator Dominick stated during the Congressional debate on February 7, 1972:

> "The amendment [giving the EEOC the right to sue] contains several cosmetic differences from the original amendment [to the same effect] as well as *one substantial change* which *reduces the time period within which the Commission may file a civil action* against the respondent from 180 to 150 days from the time the Commission first issues its informal charge." [Emphasis added].[34]

provision did not constitute federal limitation period). This point of course pervades our judicial system, as most recently illustrated by this Court's holding in *General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031 (Dec. 7, 1976), wherein the Court rejected the unanimous view of six appellate court decisions concerning the validity of pregnancy exclusions from disability plans. 45 U.S.L.W. at 4037 (Brennan & Marshall, JJ., dissenting).

[34]1972 LEG. HIST. 1347. The amendment of which Senator Dominick spoke, Amendment No. 871, contained the same time period (150 days) as the Dominick measure finally adopted by the Senate (No. 884). 1972 LEG. HIST. 1348-49, 1499-1500. An earlier Dominick proposal had provided a 180-day

Several days later, Senator Javits, describing the court enforcement procedure ultimately enacted into law, stated:

> "Let us understand that we are dealing with a round period of approximately 150 days, that *that is the allowable time* for the Commission to move into a given situation. The first 30 days represents an effort to conciliate, *making a total of six months.* So that is the Commission operation. *At the end of 6 months, it becomes plenary.*" [Emphasis added].

1972 LEG. HIST. 1528.

Of tremendous significance, the first dictionary meaning of plenary is "complete," and no other meaning permits any interpretation other than that, in Senator Javits' view, the EEOC was *finished* after six months.[35] Equally significant, no Senator or Congressman ever took issue with either Senator's explanation of the 180-day provision they were discussing, which was eventually adopted by Congress in Section 706(f)(1).

Senators Dominick and Javits had another discussion two weeks *earlier* about whether the statute should say that the EEOC "shall" or "may" file suit after 30 days. 1972 LEG. HIST. 892-894. Both Senators

period in which the Commission could sue, 1972 LEG. HIST. 553-55, as did the House-passed "Erlenborn-Mazzoli substitute," and it was this period, rather than 150 days, that was finally adopted by both houses in accordance with the conference report. 1972 LEG. HIST. 1800, 1803.

[35]Later on February 15, 1972, Senator Javits in debate referred to six months as "the maximum bracket of the Commission." 1972 LEG. HIST. 1537. While it is not entirely clear whether Senator Javits was referring to an earlier Dominick proposal (1972 LEG. HIST. 553-55) or to the original language of Senate Bill 2515 (1972 LEG. HIST. 390-91), both contained the 180-day language which now appears in Section 706(f)(1).

agreed to change "shall" to "may" in order to make clear that the EEOC was not required to file suit on the 31st day after the charge was filed. It is clear from the context of those remarks that the Senators were concerned about not imposing a strict limitation on the *front end* of when the EEOC had to file suit.[36] The very fact that they were debating this distinction, however, demonstrates that both expected that the EEOC would act promptly on charges.

On the other hand, with regard to an *ending* limitation on the EEOC's right to sue, Senator Javits expressed the concern during this discussion that

> "[*D*]*o we not have to have some cutoff time* as far as the Commission is concerned, with respect to its exercise of that discretion in bringing a civil action . . . ." [Emphasis added].

1972 LEG. HIST. 893. Responding to that concern—which is of course precisely the concern which Petitioner raises here—Senator Dominick clearly *agreed* with Senator Javits that a "cutoff time" was required with respect to the EEOC's right to file suit.[37]

[36]Thus, it was in this context that Senator Javits stated,

> "[T]he reason for the modification is that I do not feel, with an agency of this character, that the word 'shall' would have any greater meaning than the word 'may' and also because I feel the Commission should not, in view of its purpose, be under the kind of strict timetable within the parameters, of course, that the amendment sets out that it would otherwise be if we left the word 'shall' which is mandatory. We assume that they must obey the law in the amendment,"

and Senator Dominick replied,

> "I think this change is very meritorious, as I pointed out in my first statement. I do not think the Commission should be mandated on what date an agency should bring suit when we are trying to work out matters the best we can by conciliation."

1972 LEG. HIST. 894.

It is quite apparent that both Senator Javits and Senator Dominick saw *the existence* of a cutoff time on the EEOC's right to sue, which Senator Dominick reconfirmed two weeks later by his statement concerning "the time period within which the Commission may file a civil action," and which Senator Javits reconfirmed on the day the bill passed by his statement about "the *allowable* time for the Commission to move into a given situation." [Emphasis added].

Thus, the legislative history provides clear evidence of a Congressional intention to terminate the EEOC's right to sue at 180 days, and absolutely no evidence of *any* Congressman's belief that the EEOC could sue thereafter.

2. Title VII's Enforcement Scheme.

Section 706 envisions that the aggrieved party shall have 180 days to file his or her charge of discrimination with the EEOC;[38] after which filing the EEOC has 180 days to file its action; at which time the EEOC, if it has not filed suit, "shall" notify the person aggrieved of his right to sue; after which notification a private action "may be brought" within 90 days. While it is established that both of the aggrieved party's

[37]Although in this instance Senator Dominick used the words "private filing restriction" to describe the 180-day period, that phrase was used in direct response to Senator Javits' question and was obviously intended to be synonymous with the "cutoff time" on the EEOC's right to sue which both very clearly agreed should exist. 1972 LEG. HIST. 893. Senator Javits clearly accepted the explanation that the existing 180-day language met his concern that we "have to have some cutoff time as far as the Commission is concerned."

[38]With specific exceptions not here relevant. Section 706(e).

filing deadlines are federal limitation periods,[89] the Ninth Circuit held that there was *no* limitation at all on the EEOC's right to bring suit.

It is to be noted, however, that Section 706(f)(1) explicitly provides that the EEOC may intervene in the aggrieved party's action *only* in the court's discretion and *only* "upon certification that the case is of general importance." Thus, the EEOC is arguing that its right to sue exists after 180 days while necessarily having to admit that its right to intervene after 180 days is expressly limited to cases certified by a court to be of "general public importance." Yet if Congress truly intended that the EEOC's right to sue continued after 180 days, there would have been absolutely no reason even to mention the EEOC's right to intervene, for that right would be inherent in any right to sue. Even more obviously, there would be no reason to restrict the right to intervene as severely as Congress did if the EEOC could sue on its own at any time without any limitation. The only logical explanation of the limited intervention right after 180 days is that the EEOC's right to sue expires at 180 days and the EEOC may participate in a suit filed thereafter *only* as an intervenor in the limited circumstances set forth in the statute.

Furthermore, the Act's provisions setting forth the duties of the federal district courts dictate the conclusion that a time limitation on the EEOC's filing of court action *must* have been intended by Congress in the 1972 Amendments. Section 706(f) provides that once the EEOC files suit,

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[89]*E.g., Guy v. Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975) (charge filing deadline), *rev'd on other grounds*, 45 U.S.L.W. 4068 (Dec. 20, 1976); *Hinton v. CPC Int'l, Inc.*, 520 F.2d 1312 (8th Cir. 1975) (suit filing deadline); *Wong v. Bon Marche*, 508 F.2d 1249 (9th Cir. 1975) (same).

> "(4) It shall be the duty of the chief judge of the district . . . *immediately* to designate a judge in such district to hear and determine the case . . . ." [Emphasis added].

And further,

> "(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and *to cause the case to be in every way expedited.*" [Emphasis added].

In other words, the federal district courts are to move mountains in order to have the case heard as promptly as possible.

Given that unmistakable command, which imposes a considerable burden on the federal district courts, how can it be seriously argued that the EEOC nevertheless can take as long as it wishes to bring the matter to court? The statutory command of immediate federal court action is made a mockery if, as the EEOC insists, it has the right to wait three and one-half years, or five years, or even longer before filing its suit. If Congress really intended to permit the EEOC to wait interminably, would Congress have put such a burden on the federal district courts to act so quickly?

In short, it is simply inconceivable that Congress expected such immediate action by both the charging party and the federal district court, and yet none at all by the EEOC. If the 180-day provision does not cut off the EEOC's right to sue, then the EEOC is the only party in the entire process which has no federal time limitation at all.

3. The Backlog of Charges in 1972.

Despite this clear evidence of Congressional intent, the primary, if not the sole, reason why the appellate courts refused to find a 180-day limitation was the argument that Congress knew in 1972 that charges before the EEOC frequently took one to two years to process, and thus Congress could not possibly have intended to require the EEOC to file suit within six months. However, for two reasons, that conclusion simply does not follow.

First, it assumes that Congress *intended* such delays to continue and become an integral part of the statutory scheme rather than to have such delays eliminated. In other words, the EEOC's argument is that Congress was aware of the horrendous one and two year delays and set up an enforcement procedure which deliberately *incorporated* those delays into the statutory scheme by giving the EEOC forever to sue.

Yet the legislative history discussed above conclusively demonstrates that, to the contrary, far from incorporating these delays, Congress was *appalled* by them and was determined to *eliminate* them. Thus, definite time limitations were placed both on charging parties and on the federal district courts, and the 180-day limitation was imposed as a guarantee that the EEOC would perform its responsibilities expeditiously just as charging parties and the federal district courts were required to do.[40] After all, this statute was

[40]Judge Moore made precisely this point in his dissent in *EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610, 618-19 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975):

> "There is no doubt that Congress was well aware of both the average time necessary to process complaints and of the backlog which was confronting the Commission at the time of the 1972 amendments. But to conclude that Congress could therefore not have intended to impose a time limit on the Commission seems to me erroneous. A stronger inference is that Congress intended to expedite the administrative process and to eliminate the interminable delays which had previously been the rule. The entire thrust of section 706(f)(1) is toward increased efficiency."

designed to deal not simply with the situation as it existed in 1972, but, much more importantly, with the many years to follow. Thus, it is wholly incongruous to think that Congress would have been so shortsighted as to build into this enforcement scheme for years to come the very delays which it considered intolerable.

Second, several parts of the statutory scheme demonstrate a specific Congressional determination to *alter* rather than to incorporate past EEOC practices and to require prompt EEOC handling of charges. For example, there is no question that prior to the 1972 amendments, the EEOC's "reasonable cause" determination had frequently taken a year or more from the time the charge was first filed. Nevertheless, Congress specifically provided in Section 706(b) of the Act,

> "The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, *not later than one hundred and twenty days* from the filing of the charge . . . ." [Emphasis added].

Of course, this Congressional command was completely at odds with the EEOC's existing practice. Yet Congress, rather than incorporating the existing practice into the new statute, expressly directed the EEOC to *abandon* that past practice and make its determination within 120 days wherever practicable.[41]

[41]This section also shows that Congress knew how to use words affording the EEOC a flexible deadline when such was deemed appropriate.

Having thus established that the reasonable cause determination should normally be made within 120 days, it is inconceivable that Congress would have intended to permit the EEOC thereafter to take two or three years or whatever to attempt to conciliate the matter before filing suit. The 120-day provision is made a nullity unless the EEOC is required to act on its 120-day reasonable cause determination within a reasonable time thereafter, *i.e.*, within the next 60 days—for a total of 180 days.

Indeed, the conclusion that 60 days is normally a reasonable conciliation period is *expressly* confirmed by the provision in Section 706(f)(1) which states that:

> "Upon request, the court may, in its discretion, stay further proceedings for *not more than sixty days* pending . . . further efforts of the Commission to obtain voluntary compliance." [Emphasis added].

That provision establishes two significant points. First, the provision proves a Congressional awareness that court actions might have to be filed by the EEOC prior to the completion of its conciliation efforts in order to comply with the 180-day limitation, and thus affords the EEOC an additional 60 days if necessary after the suit is filed. Second, Congress obviously was convinced that 60 days was more than an adequate time for reasonable conciliation efforts, for Congress expressly *forbade* the court to delay action for more than 60 days of conciliation. Where Congress refused to permit a federal court to stay processes for more than 60 days for conciliation efforts, how can it be seriously argued that Congress nevertheless intended to allow the EEOC to take several years?

It is also highly significant that combining these two Congressional directives—120 days for the reasonable cause determination and 60 days for conciliation—yields the 180-day period here in question. This clearly demonstrates Congress' determination that the EEOC complete its two steps within 180 days and either exercise its discretion to sue or relinquish that right to the charging party. Of course, if the EEOC has not yet completed its conciliation efforts by the 180th day, Congress provided the EEOC with the opportunity to file suit and then continue conciliation for 60 days. This synchronization of the 120-day reasonable cause provision and the 60-day conciliation provision into a 180-day right to sue limitation cannot be disregarded as simply coincidental.

Another statutory provision demonstrating Congress' intention to alter rather than to incorporate the existing patterns of delay is Section 706(f)(5), which requires the federal district court to "cause the case to be in every way expedited." Of course, as previously noted, this is a legitimate imposition on the court's time and resources *if* the matter is brought to court promptly within the EEOC's 180-day time period. Yet if the EEOC is permitted to take three and a half years, as it did here—or forever, as the EEOC argues—the imposition on the court's time and resources becomes wholly unjustified. It is simply inconceivable that Congress would have expected the courts to act so expeditiously—altering rather than applying normal case handling procedures—unless Congress also intended that the EEOC too would have to abandon its past practice of delays and bring the matter to court within 180 days.

In short, we have an elaborate statutory procedure intended to alter existing practices and which imposed substantial burdens and strict time limits upon aggrieved parties and on the court. The issue here presented is whether Congress also imposed a time limitation on the EEOC as well. In a statutory enforcement scheme which depends on all three parties for success, it is inconceivable that only two parties are required to proceed expeditiously, particularly where the interminable delay by the third party effectively nullifies any expeditious action by the other two. Either the EEOC is the only party in this process which has no obligation to act in an expeditious manner, or the 180-day provision is that limitation.

4. Furtherance of the Statutory Purposes.

The EEOC insists, however, that an interminable right to sue is more consistent with the Act's remedial purposes than a 180-day time limitation. Yet it is apparent that just the opposite is true. With a 180-day time limitation, the EEOC would be forced to act promptly on behalf of aggrieved parties. Procedures would be streamlined, investigation and conciliation efforts expedited, and marginal claims weeded out. Aggrieved parties would be *guaranteed* EEOC action on their behalf within six months of the day they filed their claims and thus would be encouraged to file their claims, for the EEOC would either file suit on their behalf by the 180th day or provide them notice at that time advising them of their "right to sue" on their own behalf.

However, with no such time limitation, the EEOC has no incentive to expedite its handling of charges. The EEOC can—and obviously does—take as long

as it wants to, doing a great disservice not only to aggrieved parties but to respondents as well. While the EEOC obviously has an administrative desire for an interminable period in which to file suit, what purpose of Title VII is served by permitting—indeed, encouraging—such delay? Far from increasing compliance with the Act, such delays simply lessen the likelihood that aggrieved persons will turn to the EEOC for relief.

Indeed, one shocking fact in the case at bar—which simply exemplifies the EEOC's total disdain for the Congressional directives in Section 706—is that despite the explicit statutory language that if the Commission has not filed suit within 180 days it "*shall* so notify the person aggrieved," the EEOC has not yet done so in this case (A. 4), and routinely does *not* do so in any case unless specifically requested to do so.[42] That failure is significant for three reasons.

First, by routinely failing or refusing to advise charging parties of their right to sue, the EEOC has effectively nullified one-half of the enforcement machinery Congress set up, which is a very significant half given the charging party's ability to obtain a court-appointed lawyer and collect reasonable attorneys' fees if he or she prevails. Sections 706(f)(1) & (k). In short, the EEOC has simply substituted its judgment for the judgment of Congress by conferring upon itself an interminable right to sue, to the exclusion of notifying the aggrieved party of his or her right to sue.

Second, by ignoring the unequivocal statutory directive to advise the aggrieved party of his or her

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[42]B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 776 (1976).

right to sue after 180 days, the EEOC has cleverly enlarged its own right to sue, for had the statutory notice been sent and the charging party filed suit, the EEOC would have been limited to the restricted right to intervene discussed above and would not have been able to pursue matters beyond the charging party's charge.[48] This deliberate circumvention of the statutory limitation on the EEOC's right to intervene simply confirms the necessity of terminating the EEOC's right to sue on its own after 180 days, for without such a limitation the EEOC can and obviously will make a nullity of its limited right to intervene.

Finally, the EEOC's admitted failure to send this notice is made all the more ironic by the fact that the EEOC insists that sending such notice is all that the 180-day language of Section 706 requires the EEOC to do. Thus, the EEOC's very own practice rejects the interpretation of the Act which the EEOC would have this Court accept. In short, the EEOC's practice amounts to a determination by administrative fiat that the statutory 180-day language has no meaning at all and is therefore deleted.

5. A 180-Day Limitation Will Not Prejudice the Enforcement of Title VII.

All of the foregoing amply demonstrates the Congressional intention that the EEOC must sue within 180 days, and this Court should so hold. Such a holding will expedite the processing of all EEOC charges, without any risk that continuing discrimination will go undetected or unremedied. That is because *even if* the EEOC gives notice to the charging party rather

[48] *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180 (9th Cir. 1974).

than suing, and *even if* the charging party decides not to sue, the EEOC is still able to proceed. Section 706(b) permits EEOC Commissioners to file charges on their own, and also permits persons to file charges on behalf of other persons, provisions which assure that ongoing discrimination can be remedied or litigated by the EEOC at any time.

Thus, a holding that the 180-day provision constitutes a time limitation on when EEOC can file suit on a specific underlying charge does not create any risk that ongoing discrimination will go unremedied, for as this Court recently stated in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 467 n.13 (1975), in finding a civil rights action under the Civil Rights Act of 1870 to be barred by a one-year state statute of limitations,

> "We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently are actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his § 1981 claim in federal court."

In summary, the remedial purposes of the Act will obviously be far better served by prompt EEOC action on many charges rather than dilatory EEOC action on all charges. The statutory enforcement scheme and

the legislative history are both replete with evidence that Congress was convinced that it is the *imminence* of court action rather than the remoteness of court action which induces compliance with the Act. Unless the 180-day provision is found to constitute a federal limitation on when the EEOC can sue, the undeniable Congressional insistence on prompt EEOC action will be obliterated.

C. Assuming Arguendo That the 180-Day Provision Does Not Constitute a Federal Limitation Period on the EEOC's Right to Sue, the Most Analogous State Limitation Period Is Applicable.

If the Court somehow concludes that Congress provided no federal limitation on the EEOC's right to sue, judicial authority and legislative history require the application of the most analogous state limitation period rather than no limitation period at all.

1. General Principles.

Many federal statutes contain no limitation period, and thus this Court has repeatedly held that suits filed under such statutes are governed by the most analogous state limitation period:

Civil Rights of 1870.[44]
Civil Rights Act of 1871.[45]
Labor Management Relations Act.[46]
Sherman Antitrust Act.[47]

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[44]*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

[45]*O'Sullivan v. Felix*, 233 U.S. 318, 322-24 (1914).

[46]*Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-05 (1966).

[47]*Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397 (1906). A federal statute of limitations for suits brought under the antitrust laws was enacted by Congress in 1955. 15 U.S.C. §§15b, 16 (1970).

National Bank Act.[48]
Patent Act.[49]
Act of February 26, 1845 (re custom duties).[50]

This rule was most recently applied by this Court in 1975 in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975), wherein the Court applied the one-year Tennessee state statute of limitations to a complaint under the Civil Rights Act of 1870, making clear that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law."

Furthermore, the appellate courts have applied state limitation periods to other federal statutes which contained no federal limitation period:

Civil Rights Act of 1964.[51]
Railway Labor Act.[52]
Labor Management Reporting and Disclosure Act of 1959.[53]
Clayton Antitrust Act.[54]

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[48]*Cope v. Anderson*, 331 U.S. 461, 463 (1947); *Rawlings v. Ray*, 312 U.S. 96, 97-98 (1941); *Pufahl v. Estate of Parks*, 299 U.S. 217, 225 (1936).

[49]*Campbell v. Haverhill*, 155 U.S. 610, 613-18 (1895).

[50]*Barney v. Oelrichs*, 138 U.S. 529, 530 (1891).

[51]*EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 458-59, *aff'd on rehearing*, 521 F.2d 223 (5th Cir. 1975); *United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973).

[52]*Jones v. Trans World Airlines*, 495 F.2d 790, 799 (2d Cir. 1974).

[53]*Sewell v. Grand Lodge of Int'l Ass'n of Machinists and Aerospace Workers*, 445 F.2d 545, 548-49 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).

[54]*Englander Motors, Inc. v. Ford Motor Co.*, 293 F.2d 802, 804-07 (6th Cir. 1961); *Williamson v. Columbia Gas & Elec. Corp.*, 27 F. Supp. 198 (D.Del.), *aff'd*, 110 F.2d 15 (3d Cir. 1939), *cert. denied*, 310 U.S. 639 (1940).

Securities Exchange Act of 1934.[55]
Communications Act of 1934.[56]
Investment Company Act of 1940.[57]

Thus, the rule that a state limitation period is applied where no federal limitation period exists is firmly embedded in our jurisprudence, and with good reason, the most basic of which stems from an elemental sense of due process, best summarized by Chief Justice John Marshall's statement in 1805 that an absence of some statute of limitations "would be utterly repugnant to the genius of our laws." *Adams v. Woods,* 6 U.S. (2 Cranch) 336, 342 (1805). Were it otherwise, quite obviously defendants would be unfairly and prejudicially subjected to potentially massive financial liabilities dating back many years prior to the filing of the suit in question—liabilities mounting year after year for an undefinable period of time on the basis of claims the nature and extent of which are often unknown and thus not ones against which defendants may protect themselves.

Second, statutes of limitation are designed to protect both the courts and defendants from stale claims which depend on evidence and witnesses the availability and reliability of which have been impaired by the passage of time. *See, e.g., Campbell v. Haverhill,* 155 U.S. 610, 617 (1895).

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[55]*Richardson v. MacArthur,* 451 F.2d 35, 39 (10th Cir. 1971); *Douglass v. Glen E. Hinton Invest., Inc.,* 440 F.2d 912, 914 (9th Cir. 1971); *Klein v. Bower,* 421 F.2d 338, 343 (2d Cir. 1970); *Morgan v. Koch,* 419 F.2d 993, 996-97 (7th Cir. 1969).

[56]*Bufalino v. Michigan Bell Tel. Co.,* 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied,* 394 U.S. 987 (1969).

[57]*Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968) *cert. denied,* 394 U.S. 928 (1969).

Third, given the well-established rule that state limitation periods will be applied in the absence of a federal limitation period, it is far more reasonable to assume that Congress intended that rule whenever a federal limitation period was omitted than it is to presume that Congress intended the right to sue to be interminable. Hill, *State Procedural Law in Federal Nondiversity Litigation,* 69 HARV. L. REV. 66, 78-81, 91-92 (1955), and cases cited therein. This is particularly true in the instant case, where the Congressional concern for prompt action is so evident and pervasive.

2. The Only Exception to This Rule Has Been Where the United States Government Was Suing to Collect Revenue for the United States Treasury or to Prevent Injury to the United States Government Itself.

The few decisions of this Court which refuse to apply the most analogous state limitation period to a suit by the United States Government invariably do so because the United States is suing as a sovereign to protect its rights *as a sovereign, i.e.,* to collect money for the United States Treasury or to prevent an injury to the United States Government itself. *E.g., United States v. Summerlin,* 310 U.S. 414 (1940) (United States attempting to enforce its own claim against an estate); *Davis v. Corona Coal Co.,* 265 U.S. 219 (1924) (United States suing to enforce claims which arose during United States' operation of railroads); *United States v. Dalles Military Road Co.,* 140 U.S. 599 (1891) (United States suing to recover land it had granted); *United States v. Nashville, Chattanooga & St. Louis Railway Co.,* 118 U.S. 120 (1886) (United States suing to collect on bonds owned by the United States); *United States v. Thompson,* 98 U.S. 486 (1879)

(United States seeking recovery of funds embezzled from its Treasury).

However, whenever the United States Government has sued on behalf of private individuals, this Court has held that the most analogous state limitation period is applicable to the Government's suit. *United States v. Beebe,* 127 U.S. 338 (1888); *Curtner v. United States,* 149 U.S. 662 (1893); *United States v. Des Moines Navigation & R.R. Co.,* 142 U.S. 510 (1892).

Thus, the distinction presented by these Supreme Court decisions is *not*—as the EEOC has asserted and the Ninth Circuit implied—whether the government's suit serves a "public interest" or a "private interest." Rather, as the Fifth Circuit held in *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973), and *EEOC v. Griffin Wheel Co.,* 511 F.2d 456 (5th Cir.) *aff'd on rehearing,* 521 F.2d 223 (5th Cir. 1975), the distinction is based on whose rights are being asserted or protected by the lawsuit: the sovereign's rights or the citizens' rights?[58]

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[58]As the Fifth Circuit explained in *Georgia Power,* 474 F.2d at 923, quoted and followed in *Griffin Wheel,* 511 F.2d at 458-59:

> "Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable. *See e.g.,* United States v. Thompson, 98 U.S. 486, 488-491, 25 L.Ed. 194 (1878) and United States v. Summerlin, 310 U.S. 414, 416-417, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940). However, this principle is not apropos to the present back pay claims. Insofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action. *Cf.* United States v. Beebe, 127 U.S. 338, 346, 8 S.Ct. 1083, 32 L.Ed. 121 (1888), and United States v. Smelser, 87 F.2d 799 (5th Cir. 1937). These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action."

United States v. Beebe, 127 U.S. 338 (1888), is the best illustration of this distinction. In that case, the United States was suing at the behest of aggrieved parties to invalidate patents for land which were alleged by them to have been fraudulently obtained. The Supreme Court held that the United States Government had the right to bring suit—despite the absence of any federal statute authorizing suit—because of the obvious public interest in preventing persons from obtaining and utilizing fraudulently obtained patents. Nevertheless, the Court found the state limitation period applicable to the government's right to sue because the suit, even though maintained in the public interest, sought recovery for private citizens rather than for the United States Government itself; thus, those private citizens rather than the United States were the real parties in interest:

> "The bill itself was filed in the name of the United States, and signed by the attorney general, on the petition of private individuals; and *the right asserted is a private right,* which might have been asserted without the intervention of the United States at all." [Emphasis added].

127 U.S. at 346.

This Court's decisions, therefore, simply do not support the conclusion that a state limitation period is inapplicable whenever a public interest may be served by the lawsuit, for obviously there was a compelling public interest in eliminating fraudulently obtained patents in the *Beebe* case. That generalized notion of public interest has never been considered sufficient to exempt the government from a state limitation period where the lawsuit itself was one seeking monetary

recovery for private citizens rather than for the government itself. Thus, *no Supreme Court decision to date* has ever found the United States Government or one of its agencies to be immune from the state limitation period where the government or agency was suing to collect money on behalf of private individuals, and it would be completely inconsistent with the trends of modern law suddenly to expand the doctrine of sovereign immunity to encompass such suits.

Accordingly, this Court's recent comments in *Franks v. Bowman Transportation Co., Inc.*, 44 U.S.L.W. 4356, 4365 n.40 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), concerning the public purpose served by back pay awards in Civil Rights Act cases do not serve to bring such lawsuits within any existing exception to the rule that state limitation periods are applied in the absence of a federal limitation period, as *Johnson v. Railway Express Agency, Inc.*, certainly established. Applying the same limitation period in such cases as is applied in all other analogous actions in California "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination,"[59] for as the Court stated in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975), there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law."

Finally, it is to be noted that could there otherwise have been any question about it, Congress expressly provided by statute that in actions brought under Title

[59] *Albemarle Paper Co. v. Moody*, 422 U.S. at 421.

VII, the federal courts should rely on state laws in the absence of applicable federal laws.[60] That statute demonstrates that Congress, far from seeking to immunize Civil Rights Act suits from state statutory provisions, deliberately intended to have state provisions applied in the absence of federal provisions.

3. The Ninth Circuit's NLRB Analogy.

The Ninth Circuit, however, refused to apply the state limitation period to the EEOC's complaint. It grounded its conclusion on the theory that EEOC enforcement procedures are analogous to National Labor Relations Board (hereinafter "NLRB") enforcement procedures and thus the EEOC should be treated the same as the NLRB insofar as state statutes of limitation are concerned—a theory not even argued by the EEOC to that Court. Yet even assuming that this Court were to conclude that state limitation periods are inapplicable to NLRB court actions—an issue not yet decided by

[60] Title VII, 42 U.S.C. §§ 2000e *et seq.* (1976), is part of Chapter 21 of Title 42. Also part of Chapter 21 is a provision which appears at 42 U.S.C. § 1988 (1976), which provides, in relevant part:

> "Proceedings in Vindication of Civil Rights.
>
> The jurisdiction . . . conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States . . . but in all cases where they . . . are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and *statutes of the State* wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, *shall be extended to and govern* the said courts in the trial and disposition of the cause. . . ." [Emphasis added].

this Court[61]—that conclusion cannot properly be extended to the EEOC, for the enforcement procedures of the two agencies are radically and deliberately different.

The key distinction in the procedures of the two agencies is that the EEOC *must* file its complaint in the federal district court before any legally cognizable adjudication occurs. By contrast, the NLRB *never* has to file a complaint in the federal district court as part of its normal enforcement procedure; rather, the NLRB issues its own complaint and the NLRB has been given full authority to adjudicate cases in lieu of, and in effect as, the federal district court. Thus, the only time the NLRB goes to federal court is to the appellate level.[62] Obviously, statutes of limitation have never been thought to apply either to internal agency procedures or to appeals; they are applicable to the filing of a complaint in court, an act which the EEOC *must* do and the NLRB need *never* do. There is, in short, simply no "complaint" that a statute

[61]Neither of the cases cited by the Ninth Circuit to support its conclusion that state limitation periods are inapplicable to NLRB complaints is a Supreme Court decision, and in neither case was the statute of limitations argument directed at the NLRB's delay in filing its complaint. For all that appears in either decision, the NLRB's complaint issued within a reasonable time after the charge was filed, and the attack was directed at the NLRB's delay after its complaint had been issued. Of course, statutes of limitation have always been directed at the timeliness of the filing of the complaint, not the pace of events thereafter. Therefore, while there are certainly dicta in both lower court decisions to support the conclusion that state limitation periods are inapplicable to the filing of NLRB complaints, neither case squarely so held.

[62]The only exception is a suit by the NLRB in federal district court to obtain preliminary injunctive relief pending completion of the adjudicative process before the NLRB itself. 29 U.S.C. §§ 160(j) & (l) (1970).

of limitations could apply to insofar as the NLRB is concerned.

This criticial distinction between the NLRB enforcement procedure and the EEOC enforcement procedure is all the more significant because of the *deliberate* Congressional decision to withhold from the EEOC the authority which the NLRB has always enjoyed. As discussed above, extensive efforts were made in Congress in 1972 to give the EEOC full NLRB-type cease and desist enforcement authority, and those efforts were rejected by Congress in favor of the present requirement that the EEOC initiate its enforcement efforts by the filing of a complaint in the federal district court. Thus, to hold the enforcement procedures of the two agencies to be analogous is to ignore the express Congressional refusal to give the EEOC the same enforcement authority it has given the NLRB.

The NLRB analogy is thus totally inapposite.

4. Conclusion Regarding State Limitation Period.

The foregoing thus makes clear that at least insofar as the EEOC's complaint seeks to collect back pay for private individuals, that portion of its complaint is barred by the state limitation period.[63] However, for the reasons set forth below, Petitioner submits that the state limitation period should *also* be applied to

[63]*Accord: EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 459 (5th Cir. 1975), and *United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973), *followed in Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1195-96 (5th Cir. 1976); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *EEOC v. Eagle Iron Works*, 367 F. Supp. 817, 823-24 (S.D. Iowa 1973); *EEOC v. Christianburg Garment Co., Inc.*, 376 F. Supp. 1067, 1071-73 (W.D. Va. 1974).

that portion of the EEOC's suit which seeks injunctive relief as well.[64]

First, *Johnson v. Railway Express Agency, Inc.* applied the state limitation period to *both* the injunctive relief and the back pay parts of the plaintiff's suit. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

Second, even in its request for injunctive relief, the EEOC is not seeking to prevent an injury to the United States Government itself, but rather to private citizens, so that the existing exception set forth in the Supreme Court decisions discussed *supra* pages 37-41 does not bar application of the state limitation period to the request for injunctive relief.

Third, no prejudice results from applying the state limitation period to the request for injunctive relief, because "there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under §1981." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 467 n.13. In this respect, it is critical to recognize that charges may be filed not only by any aggrieved party, but also by any Commissioner of the EEOC or by any person on behalf of a person claiming to be aggrieved. Section 706(b). Thus, if the EEOC now has a stale claim it would still like to pursue, one of the EEOC's own Commissioners can simply file a new charge and begin the enforcement machinery anew, with far greater chance for success given the relative freshness of the available evidence of noncompliance, if any there be, but without the unconscionable prejudice to the respondent which would otherwise occur by proceeding on an old and stale charge.

[64]Contrary to the holding below and the Fifth Circuit's holding in *Griffin Wheel*, 511 F.2d at 459.

There is, therefore, simply no reason to permit the EEOC to proceed on what is now a seven-year-old claim. If the unlawful practices have been corrected, the Act's purposes have been fulfilled without the necessity of litigation. On the other hand, if any unlawful practice continues, the EEOC can proceed on a timely rather than a stale charge with far greater likelihood of vindicating the purposes of Title VII.

Conclusion.

There is absolutely no basis—legislative history, statutory scheme, fundamental fairness — on which this Court can reasonably conclude that Congress intended the EEOC's right to sue to be interminable. Accordingly, for the reasons set forth in detail above, this Court must conclude that either the 180-day federal limitation period or the most analogous state limitation period applies to the EEOC's right to sue under Title VII.

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Respectfully submitted,

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